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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY RAY CONTRERAS et al.,

Defendants and Appellants.

E062772

(Super.Ct.No. FWV1301708)

OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller,  
Judge. Affirmed with directions.

Kristin A. Erickson, under appointment by the Court of Appeal, for Defendant and  
Appellant Danny Ray Contreras.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant  
and Appellant James Edward Hall.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Samantha L.

Begovich and Mary K. Strickland, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Danny Ray Contreras and James Edward Hall shot and killed a fellow Ontario Varrio Sureno (OVS) gang member. Both were convicted of first degree murder, gun-use enhancements and a gang enhancement. Both defendants make the following claims on appeal:

1. There was insufficient evidence presented to support that the OVS gang was a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)<sup>1</sup> because the People did not prove the primary activities of the gang were criminal activities.

2. The trial court erred by imposing a 10-year sentence on the gang enhancement pursuant to section 186.22, subdivision (b)(1)(C).

The People also have stated that Contreras was wrongfully sentenced to 25 years to life for the personal gun use enhancement under section 12022.53, subdivision (d).

We find there was substantial evidence presented to show that the primary activities of the OVS gang were qualifying criminal activities. We agree that the section 186.22, subdivision (b)(1)(C) enhancement should not have been imposed and will direct the trial court to strike the sentence on the enhancement. We reject the People's concession that defendant was wrongfully sentenced to 25 years to life on the weapons-use enhancement.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

## **FACTUAL AND PROCEDURAL HISTORY**

### **A. PROCEDURAL HISTORY**

Defendants were charged with willful, deliberate and premeditated murder. (§ 187, subd. (a).) They were additionally charged with several enhancements as follows: personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)); personally and intentionally discharged a firearm (§ 12022.53, subd. (b)); personally discharged a firearm (§ 12022.53, subd. (c)); a principal personally and intentionally discharged a firearm causing great bodily injury and death and the person violated section 186.22, subdivision (b) (§ 12022.53, subds. (d) & (e)(1)); a principal personally and intentionally discharged a firearm and violated section 186.22, subdivision (b) (§ 12022.53, subds. (b) & (e)(1); a principal personally discharged a firearm and violated section 186.22, subdivision (b) (§ 12022.53, subds. (c) & (e)(1); and the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)).

Contreras's jury found him guilty of first degree murder and found all of the enhancements true, except for the allegation under section 12022.53, subdivision (d) that he personally used a firearm that caused the death of Solario. Hall was found guilty of first degree murder and all of the enhancements were found true.

Contreras was sentenced to 25 years to life for the first degree murder, plus 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1). Further, he was sentenced to 10 years under section 186.22, subdivision (b)(1)(C); the sentence was stayed. Hall was sentenced to 25 years to life for the first degree murder, plus 25 years to

life pursuant to section 12022.53, subdivision (d), plus 10 years for the gang enhancement.

B. FACTUAL HISTORY<sup>2</sup>

1. *THE SHOOTING*

On May 14, 2013, Laura Gutierrez Villalobos lived in a house located at 118 West Park Street in Ontario. Austreberto Padilla, who was her brother, John Lopez, Salvador Garcia and Gene Kelley also lived in the house with her. Padilla's girlfriend at the time was Gabriel Bautista.

That day, at around 6:00 p.m., Villalobos, Padilla, Bautista and the other above-named residents were home. Padilla's friend, Samuel Solorio, who was known as "Crook," came over and visited Padilla around 6:00 p.m. Solorio was a member of OVS. Padilla was also a member and had been "jumped into" the OVS gang about one year prior to that night. Padilla hung out with defendants who he believed were members of the OVS gang.

When Solorio arrived, he and Villalobos sat in her car in front of the house. Solorio appeared nervous. He kept looking out of the car in both directions. Solorio was carrying a backpack. Solorio had a small silver gun, money and some bullets in the backpack. Villalobos drove Solorio to the store. While going to the store, Solorio kept saying he thought someone was following them. On the way back to the house, Solorio

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<sup>2</sup> Defendants were tried in front of two juries. Unless otherwise indicated, all testimony was presented to both juries.

was still looking around as if he was being followed. Villalobos did not see anyone following them.

Villalobos and Solorio went inside the house. Villalobos believed that Solorio went into the bathroom and used drugs.

Solorio then went to the living room windows and kept looking back and forth. Solorio, Padilla and Bautista went outside to the alley next to the house and shot Solorio's gun into the air. They all came back inside. Solorio put the gun in his pocket after they were shooting it in the alley.

Padilla also thought that Solorio seemed paranoid. Solorio had told Padilla two weeks prior that he thought his "homies" were after him.

Villalobos called Juan Razo, her boyfriend at the time, to pick her up because everyone in the house was being too loud; she sounded to Razo to be scared. When Razo arrived, Villalobos walked out to meet him. Solorio was in the living room and had covered his face with a bandana. He ran in front of her outside. He had his gun in his hand and pointed it at Razo. Villalobos and Padilla ran to stop Solorio, explaining to him that Razo was Villalobos's boyfriend. Solorio pointed the gun down.

At that point, Villalobos, Padilla and Razo observed defendants coming quickly toward them. Padilla, Razo and Solorio were all standing together. Bautista was inside the house. Hall was carrying a gun. Hall said to Solorio, "What's up Homes?" Hall was known as Ghost. Contreras was known as Danny Boy. Solorio went to talk to defendants. Villalobos recalled that Solorio either still had the gun in his hand or he put

it in a pocket; Razo had seen him put it in his waistband; Padilla said it was not in Solorio's hand.

Hall asked Solorio, "What's up, my boy?" Solorio pointed to Razo and said, "This fool is trippin'." It was at that point Padilla saw defendants both pull guns from their pockets and shoot Solorio. Padilla heard several gun shots. Solorio did not have a gun in his hand before they shot him.

Villalobos saw Hall lift up his arm and shoot Solorio. Solorio had his hands down at his sides. After Hall shot at him, Solorio tried to shoot back but his gun did not work. Solorio tried to run inside the house but they shot him in the back. Contreras had something in his hand but Villalobos was unsure if it was a gun; Razo thought it was a gun. Both defendants' hands moved when Villalobos heard the gunshots. Razo saw two muzzle flashes and thought both defendants were shooting at Solorio. He saw both of their hands extended. Villalobos heard more than three shots. Defendants ran away. Bautista was inside the house and heard six shots.

Solorio went inside the house. Once defendants left, Villalobos went inside to check on her children, who were still in the house. Villalobos called the police. Razo threw Solorio's gun in a planter behind the house.

Solorio was bleeding and turning purple. There was blood coming from his nose and mouth. He had blood all over his clothing. He was having trouble breathing and

appeared to be dying. Solorio kept saying “Ghost” and “Danny Boy.”<sup>3</sup> He did not say they were the shooters. Razo and Padilla took Solorio out into the alley next to the house because of the young children in the house. Razo stayed with Solorio and tried to stop the bleeding from a bullet wound to his chest.

## 2. *INVESTIGATION*

Ontario Police Sergeant Mark Ortiz was called to investigate the shooting. The area where the shooting occurred was a known OVS gang area. Solorio was laying in the alley when the police arrived. Solorio was asked who shot him but he did not respond. Solorio had a holster for a small gun attached to his leg. No gun was found.

A hat was found at the shooting scene with “Ontario ANS” written on it. A blue bandana was also found. Fired cartridges were found at the scene. All three cartridge cases had “Top Brass 380 auto” printed on them.

Padilla dumped his backpack over the neighbor’s fence before the police arrived because it had a stolen gun inside. Padilla’s backpack containing the gun was found at a property adjacent to the West Park house. There was ammunition in the backpack. There were no drugs or money found in the backpack. There was no .380-caliber ammunition.

Villalobos initially did not pick anyone from the six-pack photographic lineups because she was scared. Padilla was in the OVS gang at the time and warned her not to identify anyone. Villalobos identified both defendants at the preliminary hearing.

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<sup>3</sup> Villalobos did not say anything about “Danny Boy” at the preliminary hearing. Padilla did not hear Solorio say “Danny Boy.”

Padilla's gang moniker was Truche, which meant "watch out." He was also known as Junior and Yume. Padilla did not initially choose anyone from the six-pack photographic lineup because he was scared. Padilla wrote down Ghost on a diagram of where the shooters ran after the shooting and gave it to detectives. Padilla also told detectives to check who the last phone call to Solorio on his cell phone was; Solorio got a call right before the shooting and he seemed scared. Padilla identified both defendants when he was shown the six-pack photographic lineups a second time.

Razo claimed he could not identify defendants as the shooters.

Villalobos told the police that Hall had a big "Oterio" tattoo on the side of his neck. Contreras had an Oterio tattoo on the back of his head. Bautista had seen other OVS gang members with "Oterio" tattoos.

Padilla indicated there were Little Black Angels and Black Angels in the OVS gang. A person could not have an OVS tattoo unless he was a gang member. Padilla had no tattoos. The night of the shooting, Solorio was wearing a red hat with the words "Oterio ANS" printed on it, which stood for Junior Black Angel, the middle level OVS gang member.

An autopsy was performed on Solorio. Bullets were recovered from Solorio's left buttock, abdomen and right upper chest. He had other gunshot wounds. The gunshot wound to Solorio's back was the cause of death. He had methamphetamine and marijuana in his system.

All three cartridge cases found at the scene were fired from the same gun. The bullets found during the autopsy were also compared. Two of the bullets conclusively



were fired from the same gun. They were .380-caliber. The third bullet was missing parts so it could not be determined if it was fired from the same gun.

Cell phones from Solorio and Contreras were confiscated and the records were analyzed. There was a contact on Contreras's phone for James Big, which turned out to be a phone that belonged to Hall's girlfriend.

A call was made from the phone attributed to Hall to Solorio at 11:17 p.m. on May 14, 2013. It was made less than one mile from where the murder occurred. The first 911 call for the murder was at 11:27 p.m. Hall made another call about one mile from the murder at 11:45. Contreras made a call from this cell phone at 11:17 p.m. and was within two miles of the murder.

The night after the murder, two men came to Villalobos's house; she recognized them as gang members. They drove up in the alley next to her house in a car and were yelling into the house. She observed one of them run his finger across his neck, which she thought meant he was going to kill them. She heard them say that if her and Padilla said anything, they were going to die.

Just prior to the preliminary hearing, someone tried to crash into the back of Villalobos's car. There were four gang members in the car making "O" gang signs. They called her a "rat." They told Villalobos they were going to kill her family. One of the men was the same as came to her house the day after the shooting. Villalobos was relocated.

A few weeks prior to the shooting, Hall told Padilla that Solorio had to die because he was “no good.”<sup>4</sup> Padilla moved out of the area after the shooting because he was scared; he no longer associated with OVS.

### 3. *GANG EVIDENCE*

San Bernardino County Sheriff’s Deputy Owen Domon worked at the West Valley Detention Center. On December 17, 2012, he was conducting searches of inmates who were headed to court. He searched Matthew Atilano. A small ball of plastic was found inside his anal cavity, which contained notes, or what were known as “kites.” Kites were notes sent by prison inmates to outside the prison. One note was marked N and Nitro. Juan Gill used the name Nitro. Gill was a Black Angels member and a member of the Mexican Mafia.

One of the kites addressed to Nitro said, “I don’t have time for the bullshit wannabes out here. You know how I am Nitro. Fuck them if they act up.” The person who wrote the note promised not to use Nitro and other gang member’s names. Also in that note was reference to “Crook” and that he got caught with some “wilas concerning you, Drowsy and him.” A wila was a kite. The note further provided, “He said he got at you. I already beat his ass. If you want him clipped or anything else, let me know.” This meant the writer of the notes was willing to do anything directed by Gill. The notes made no reference to Ghost or Danny Boy.

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<sup>4</sup> At the preliminary hearing, Padilla testified he had not met Hall before the night of the shooting.

On October 25, 2012, Ontario Police Officer Matthew Esporales was on patrol in the area of Francis and San Antonio Streets in Ontario. While patrolling at about 1:00 a.m., he observed an individual standing near a cinder block wall. The individual quickly moved from the wall when Officer Esporales drove up. He was stopped and it was determined to be Solorio. Officer Esporales searched the cinder block wall and discovered several kites in the wall. A gang member caught with a kite was subject to assault, a fine from the Mexican Mafia, or possibly death.

Ontario Police Sergeant Rudy Lopez had been part of the gang unit from 2005 through 2008. He was familiar with the OVS gang. While working patrol, he had direct contact with OVS members and had prepared field interview cards for members. Those cards document clothing descriptions, tattoos and location where the gang member was contacted. Onterio was a symbol for the OVS gang.

Sergeant Lopez had contact with Contreras between 2005 and 2008. Sergeant Lopez contacted him on March 15, 2006, in OVS territory. He was with another OVS member. A second contact was made with Contreras on December 2, 2006, and he was again with a fellow OVS member.

Hall was also contacted in March 2009. Hall admitted to being an OVS member. Hall was also contacted on August 11, 2012. Hall admitted to being an OVS member and was wearing a hat with a symbol used by OVS. He had an Onterio tattoo on his neck. He had an OVS tattoo on his chest.

Sergeant Lopez had contact with Hall on April 23, 2009. He was wearing a hat with the words "Sox" on it which was a symbol for the OVS gang. This symbol also

signified allegiance of OVS to the Mexican Mafia. He had another contact with Hall on April 15, 2010. Hall was in OVS gang territory. He had several OVS gang tattoos and was wearing the Sox hat. In Sergeant Lopez's opinion, both defendants were OVS gang members.

Contreras's residence was searched. He had a movie about the Mexican Mafia and a sweater with "Ontario South Side" embroidered on the back was also found. Also a hat with a symbol used by OVS was found in the trash.

Hall identified as OVS when he was booked into jail. He identified himself as Tank. Contreras also identified himself as an OVS member when booked into jail. His nickname was Danny Boy.

Ontario Police Detective Brice Devey was assigned to the gang unit. The biggest gang in Ontario was OVS. OVS had a three-tier system: Black Angels were on the top, Junior Black Angels were in the middle, and OVS or South Side Ontario at the bottom. OVS had several hundred members. OVS claimed all of Ontario as its territory. OVS had hand signs and symbols. They used the letters OVS and the word Ontario. An OVS member had to have earned a tattoo. An OVS member earned a tattoo by committing a crime, including beating up someone, earning money for the gang, and shooting or killing someone.

Detective Devey explained that the pattern of activity for OVS was criminal activity. "They're doing everything from graffiti and thefts to assaults to robberies, carjacking to murders, narcotics sales. They kind of run the gamut."

Detective Devey was given the kites found in the wall near Solorio. There were eight notes found. Five were relevant to the homicide. Some of them had the word “hot” on them, which was an indication that there was important information in the note.

One of the notes stated that there was only one way in and one way out of the gang. To get in, a person had to be jumped in. A person had to be killed to get out of a gang. One kite was addressed to Crook from the Junior Black Angels. One discussed someone becoming a Junior Black Angel. The kite also referred to Gill.

It was impossible to know who wrote the kites and for whom they were intended. The kites found in Solorio’s possession were found about one and a half months prior to the kites found on Atilano. The kites found in jail referred to the kites on Solorio; the Mexican Mafia was aware that Solorio had been caught with kites. The kite that used the name Drowsy referred to a Black Angels member named Cesar Mora. Detective Devey had spoken with Mora several times; Mora admitted that his gang moniker was Drowsy. There was an additional kite addressed to “Crook de Onterio Angelitos Negros,” which was Solorio and Junior Black Angels. Gill was in charge of directing any “hits” on gang members who were a problem. Black Angels in OVS were known for killing their own gang members if they needed to clean house.

Detective Devey had filled out an identification card for Contreras on September 19, 2012. Contreras told Detective Devey he was an OVS member and was trying to work his way up. Contreras also admitted to being an OVS member on October 14, 2011. Detective Devey spoke with Contreras on May 16, 2013, and he admitted he was

an OVS member. Detective Devey opined that Hall was an OVS gang member based on Hall's admissions to him and Hall's gang tattoos.

Detective Devey was asked about the pattern of criminal activity by the prosecutor, as follows: "And when you were talking about a pattern of criminal activity, are there some specific crimes that you see within OVS that are repeatedly committed." Detective Devey responded, "Yeah. Most all the crimes are repeatedly committed within. Again, everything from vandalism to assaults to narcotics sales, a lot of robberies, a lot of homicides." He was then asked, "Okay. Which ones do you typically see more? What are most common?" Detective Devey responded, "We see a lot of homicides, a lot of robberies, a lot of assaults and a lot of narcotics sales."

Detective Devey was then asked about Daniel Vera. Vera was a Black Angels member who had to kill another Black Angel member due to gang politics. Vera was convicted of first degree murder on July 21, 2011, and the gang allegation was found true.

Detective Devey had previous contact with Angel Marines, who was a Black Angel member with the moniker Vala. He was convicted of involuntary manslaughter of a fellow Black Angel on January 22, 1997. Thomas Leyva was a Black Angel member known as Night Owl. Levy was convicted of voluntary manslaughter of a fellow Black Angel member on May 25, 2012.

Detective Devey had arrested Gilbert Medina on several occasions. Medina was arrested for making terrorist threats against Villalobos in this case. He was convicted of making terrorist threats on March 4, 2014.

Detective Devey had contact with Mora several times and had testified against him in court. He was convicted on September 28, 2008, of assault with a deadly weapon and the gang allegation was found true.

Detective Devey was asked again if he could briefly review the gang's primary activities. He responded, "The criminal activity—the primary activity they focus on—it's hard to say exactly what they focus on. There's a lot we come into contact routinely; graffiti, narcotic sales, possession of handguns, car thefts and assault and murders.

Detective Devey then stated the primary activities included the murder case involving Vera. Further, the possession of a deadly weapon, as well as a gang case, involving Mora, showed a pattern of OVS committing crimes. Moreover, the voluntary manslaughter that involved Leyva showed a pattern of criminal activity.

Detective Devey also testified about an attempted murder case involving Johnathan Valderama, a Black Angels member. He was convicted of attempted murder for shooting at police officers during a traffic stop.

In addition, Detective Devey conducted a traffic stop on Michael Baca in June 2010. He was a Black Angels member, and there was a gun in the car. He was convicted of possession of a firearm by a gang member.

Finally, Detective Devey conducted a traffic stop on Albert Daniel Moreno in December 2009. He was a Black Angel member. He was convicted of being a felon in possession of a firearm along with a gang enhancement. Detective Devey opined these were just some of the crimes that showed an actual pattern of gang activity.

Detective Devey also surmised that the murder of Solorio was committed to benefit the gang. Hall said to Padilla that Solorio had to be murdered. A gang member killing another gang member who was in bad standing would commit the crime for the benefit of and at the direction of the gang. Further, there were two gang members together who shot Solorio. It benefitted the gang to get rid of a weak member.

4. *CONTRERAS JURY ONLY*

Detective Devey interviewed Contreras on May 16, 2013. Before the interview, Detective Devey had received information that Contreras was involved in the shooting. Detective Devey had known Contreras since he was 13 or 14 years old. Contreras first stated he had only heard about Solorio's shooting but was not involved. Detective Devey told him that he knew he was present during the shooting. Contreras then admitted he was there but did not know what was going to happen. Contreras only went to the West Park Street house with his "homie" to see what was happening. When Contreras approached Solorio, the shots started happening and he just ran. He did not know who shot Solorio.

Contreras finally stated that Hall killed Solorio. When they arrived together at the West Street house, Hall called Solorio over and told him he had to talk to him. Contreras stayed with Padilla. Hall and Solorio got into a quick fist fight and Contreras heard shots fired. Contreras then admitted that he pulled out a gun but denied he shot Solorio. He pulled out his gun because he was worried that Solorio was going to do something because he had heard in the neighborhood that Solorio was not good. He never fired his gun.



5. *HALL JURY ONLY*

Hall was interviewed by Ontario Police Detective Chris Martinez on May 16, 2014. Detective Martinez had previous contact with Hall and believed he was an OVS gang member. Hall admitted his moniker was Ghost. Hall initially denied he ever went to the West Park Street house and claimed he had nothing to do with the murder. Hall claimed that if he was asked by a more senior gang member to do something, he could refuse.

After repeatedly denying any involvement, Hall finally said, “All right, yeah. Okay. I was there, all right? All right? Or whatever dude, you know? I start fighting with him, I hit him. Bam. Fucking, ah, I hear fucking, Pow, pow, you what I mean?” He heard four or five shots. Hall intended only to beat up Solorio just to put him in check. Hall would not say he was with Contreras. Hall had scratches on his hands from the fight.

The only defense evidence presented was that Villalobos never told anyone that Solorio said Danny Boy after he had been shot.

**DISCUSSION**

A. SUFFICIENT EVIDENCE OF PRIMARY ACTIVITIES OF THE OVS GANG

Defendants both contend the evidence presented by the People was insufficient to establish the primary activities element of the gang enhancement under section 186.22, subdivision (b)(1)(C).

1. *ADDITIONAL FACTUAL BACKGROUND*

Detective Devey's testimony regarding the OVS gang and its activities has been set out in detail, *ante*. Both juries were instructed they must determine whether Solorio's murder was committed for the benefit of the gang. They were instructed, "A criminal street gang is an on-going organization, association or group of three or more persons, whether formal or informal; [¶] One, that has a common name or common identifying sign or symbol. [¶] Two, that has as one or more of its primary activities the commissions of *murder, attempted murder, possession of firearms, criminal threats, tagging, graffiti, possession for sale of controlled substances, drugs*. [¶] And, three, whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity." They were further instructed, "In order to qualify as a primary activity, the crime must be one of the group[']s chief or principal activities, rather than an occasional act, committed by one or more persons who happen to be members of the group." (Italics added.)

Both juries were further instructed, "If you find the defendant guilty of a crime in this case, you made [*sic*] consider that crime in deciding whether one of the group's primary activities was the commission of that crime and whether a pattern of criminal gang activity has been proved."

The People argued in closing to the Hall jury, "I have to show you what their primary activities are. It's not bowling. It's criminal activity. All right. I asked Detective Devey what kind of things the gang does; murder, attempted murder, possession of a firearm, criminal threats, tagging graffiti, possession for sale of drugs."

To Contreras’s jury, the prosecutor argued, “Primary activities, I have to show—okay? Why does the gang exist? What are they doing? And as you recall, Detective Devey said oh, they commit crimes and typically they are committing murder, attempted murder, possession of firearms, criminal threats, those kinds of things. So that was supported by Detective Devey’s testimony.”

## 2. ARGUMENT

When the sufficiency of evidence is challenged on appeal, we must review “the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Davis* (2009) 46 Cal.4th 539, 606.) “We do not reweigh the evidence or revisit credibility issues, but rather presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence.” (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1004.)

“Section 186.22, subdivision (b)(1) imposes additional punishment when a defendant commits a felony for the benefit of, at the direction of, or in association with a criminal street gang. To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group’s primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group’s members must engage in, or have engaged in, a pattern of criminal gang activity.” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.)

Section 186.22, subdivision (e) lists 33 crimes and includes, among others, prohibited possession of a firearm, criminal threats, murder and assault with a deadly weapon. “The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes be one of the group’s ‘chief’ or ‘principal’ occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group’s members.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) Past offenses, as well as the present crime, have some tendency to prove the group’s primary activities, and thus both may be considered by the jury on the issue of the group’s primary activities. (*Id.* at p. 323.)

A gang expert usually testifies as to the gang’s primary activities. Evidence Code section 801 limits expert opinion testimony to an opinion that is “[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates. . . .” (Evid. Code, § 801 subd. (b).)

After the briefs were filed in this case, the California Supreme Court issued its opinion in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). The California Supreme Court clarified the principles governing testimony by a gang expert witness based on hearsay. *Sanchez* disapproved prior precedent to the extent it held an expert’s opinion is not hearsay because any statements related by the expert go only to the basis of the expert’s opinion. (*Id.* at pp. 670, 683-684.) It explained that an expert may testify about his background information regarding his knowledge and expertise, but may not testify

about case-specific facts about which he has no personal knowledge. (*Id.* at pp. 677, 685.) The court defined case-specific facts as “those relating to the particular events and participants alleged to have been involved in the case being tried.” (*Id.* at p. 676.)

The *Sanchez* court also determined that under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), if hearsay relied upon by an expert witness was testimonial and an exception did not apply, the defendant should be given the opportunity to cross-examine the declarant or the evidence should be excluded. (*Id.* at p. 685.)

The court adopted the following rule based on the above: “When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert’s opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing.” (*Sanchez, supra*, 63 Cal.4th at p. 686, fn. omitted.)

The *Sanchez* court applied the test to its own facts. First, the expert testified to five prior police contacts with the defendant. Three of them were based on police reports prepared by the investigating officers during the investigations of those crimes and not admitted into evidence. These types of “statements about a completed crime, made to an investigating officer by a nontestifying witness . . . are generally testimonial unless they are made in the context of an ongoing emergency . . . or for some primary purpose other than preserving facts for use at trial.” (*Sanchez, supra*, 63 Cal.4th at p. 694.) It did not

matter the officer summarized the statements or that the defendant himself was not accused of the crimes. (*Id.* at pp. 694-695.) Second, the expert testified the defendant was a gang member based on the content of a sworn STEP notice retained by police, which included the defendant's biographical and other information. This notice was testimonial because it was a formal sworn statement from a police officer the information was accurate, and its primary purpose was collecting information for later use at trial. (*Id.* at p. 696.) Finally, the expert testified regarding statements from a field identification card detailing a contact with the defendant. The court found the expert's testimony was unclear and confusing on this issue, but "[i]f the card was produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial." (*Id.* at p. 697.) The *Sanchez* court concluded the confrontation clause violation was prejudicial as to the gang enhancements because the sole evidence of the defendant's intent to benefit the gang was the expert's recitation of testimonial hearsay. (*Id.* at p. 699.)

Here, we are convinced the properly admitted non-hearsay evidence supports the jury's finding on the primary activities of the gang.<sup>5</sup> Detective Devey had significant personal experience with the OVS gang, having worked in OVS territory since he was a patrol officer in 2005. (*Sanchez, supra*, 63 Cal.4th at p. 676 [expert may not testify

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<sup>5</sup> Defendants have only argued that the evidence was insufficient to support the jury's verdict on the primary activities of the gang. We need not address the evidence that should have been excluded or whether the inclusion of the evidence was harmless under either the state or federal standard. We only need establish that there was sufficient properly admitted evidence to support the element of primary activities.

concerning case-specific facts for which he has no personal knowledge].) Detective Devey testified that the criminal activity by OVS members ran the “gamut” and included graffiti, theft, assaults, robberies, carjacking, murders and narcotics sales. Later he testified that “[w]e see a lot of homicides, a lot of robberies, a lot of assaults and a lot of narcotics sales.” A third time, Detective Devey was asked about the primary activities. He stated, “The criminal activity—the primary activity they focus on—it’s hard to say exactly what they focus on. There’s a lot we come into contact [with] routinely; graffiti, narcotic sales, possession of handguns, car thefts and assault and murder.”

There were numerous crimes that were included in the instructions that showed the primary activities of the gang. Two of them directly involved Detective Devey.

Detective Devey stopped Baca in 2010. Detective Devey identified him as a Black Angels member and Baca had a gun in his car. Baca was found guilty of possession of a firearm by a gang member. Further, Detective Devey stopped Moreno, who he was personally familiar with, in December 2009 and Baca was in possession of a firearm. Detective Devey identified him as a Black Angels member. Baca was convicted of being a felon in possession of a firearm. Detective Devey testified based on his own personal contact and arrests of Baca and Mora.

Detective Devey testified about a murder committed by Vera, and stated it showed the primary activity of the OVS gang was murder. Detective Devey was familiar with Vera and he was a Black Angels gang member. The certified copies of the conviction were admitted as an exhibit, which showed Vera was convicted of first degree murder and the gang allegation on July 21, 2011. The certified copies of the conviction were not

inadmissible hearsay. (*People v. Duran, supra*, 97 Cal.App.4th at p. 1460 [Evidence Code section 452.5, subdivision (b) creates a hearsay exception allowing admission of qualifying court records to prove the fact of the conviction and that the offense occurred].)

Further, there was overwhelming evidence presented that Hall and Contreras were members of the OVS gang. Here, they both committed murder, as found by the jury, a crime listed in section 186.22, subdivision (e). Hall complains this one murder was not sufficient to show a consistent pattern of criminal activity. However, as shown, several other crimes were shown to be committed by known OVS members starting in 2009, continuing in 2010 and 2011, and culminating in 2013 with the two instant murders.

There was repeated and consistent criminal activity committed by OVS gang members. Detective Devey had years of experience working with the OVS gang. He was personally involved in many of the crimes, to which he testified, that involved OVS gang members. It was clear that his information about the OVS gang's primary activities was based on his personal experiences and certified documents. The properly admitted evidence clearly established the primary activities of the gang to support the section 186.22, subdivision (b)(1)(C) enhancement.

#### B. IMPOSITION OF 10-YEAR GANG ENHANCEMENT

Defendants contend the trial court could not impose a 10-year sentence on the section 186.22, subdivision (b)(1)(C), gang enhancement because they were sentenced to a life sentence for the first degree murder. They were instead subject to the section



186.22, subdivision (b)(5), sentence which only requires a minimum parole period of 15 years. The People concede the error.

At the time of sentencing, the trial court sentenced both defendants to 25 years to life for the first degree murder. Hall was sentenced to a 10-year consecutive sentence for the section 186.22 (b)(1)(C) enhancement. Contreras was sentenced to 10 years on the enhancement under section 186.22, subdivision (b)(1)(C), and the sentence was stayed.

In *People v. Lopez* (2005) 34 Cal.4th 1002, the court considered whether a first degree murder committed for the benefit of a gang was subject to the 10-year enhancement in section 186.22, subdivision (b)(1)(C), or whether the murder was governed instead by the 15-year minimum parole eligibility term in section 186.22, subdivision (b)(5). (*Lopez*, at p. 1006.) The California Supreme Court found it appeared the Legislature “intended section 186.22[, subdivision ](b)(5) to encompass both a straight life term as well [as] a term expressed as years to life (other than those enumerated in subdivision (b)(4)) and therefore intended to exempt those crimes from the 10-year enhancement in subdivision (b)(1)(C).” (*Id.* at p. 1007.)

Here, both defendants were sentenced to 25 years to life for the first degree murder of Solorio. As such, they were not subject to a 10-year sentence on the gang enhancement. We will direct the trial court to modify the judgment by striking the 10-year gang enhancements on the first degree murder convictions for both defendants.

C. CONTRERAS’S 25-YEARS-TO-LIFE SENTENCE PURSUANT TO  
SECTION 12022.53

The People have stated in their brief that Contreras could not be sentenced to 25 years to life pursuant to section 12022.53, subdivision (d), because the jury found the allegation not true and he must be resentenced to 20 years to life under section 12022.53, subdivision (c). We reject this concession because Contreras was sentenced to 25 years to life under section 12022.53, subdivisions (d) and (e)(1).

The jury found the allegation that Contreras used a gun during the commission of the murder, the allegation pursuant to section 12022.53, subdivision (d), to be not true. However, it did find true the allegation that a principal personally discharged a firearm, causing death, and the gang allegation was found true under section 12022.53, subdivisions (d) and (e)(1). At the time of Contreras’s sentencing, the trial court noted, “Again, under 12022.53(f), only one enhancement for the 12022.53 enhancements can be imposed. I will impose that under Penal Code section 12022.53(d) and (e)(1), principal causing injury with a firearm during a felony and, it’s gang related, and that’s 25 years to life. No sentence will be imposed for the other 12022.53 enhancements.”

A person who personally and intentionally discharges a firearm in the commission of a felony, including murder, and “proximately causes great bodily injury . . . or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.” (§ 12022.53, subd. (d).) Subdivision (e)(1) of section 12022.53 is a gang-related firearm provision. It applies to any person who is a principal in a murder if it is “pled and proved” that the

person committed the crime for the benefit of a gang under section 186.22, subdivision (b) and that “[a]ny principal in the offense committed any act specified in subdivision (b), (c), or (d) [of section 12022.53].” If such is shown, a 25 years to life sentence is appropriate. (§ 186.22, subd. (e)(1); see also *People v. Yang* (2010) 189 Cal.App.4th 148, 154.)

Contreras, who was convicted of first degree murder like Hall, was properly sentenced to 25 years to life on the section 12022.53 subdivision (d) and (e)(1) enhancement.

### **DISPOSITION**

The trial court is directed to strike the 10-year gang enhancements imposed pursuant to section 186.22, subdivision (b)(1)(C) on both defendants. The trial court is further directed to amend the abstracts of judgment to reflect the modifications and to forward certified copies of the amended abstracts of judgment to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER

J.

We concur:

RAMIREZ

P. J.

McKINSTER

J.